FILED
JUL 28 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 205

320 US #8
CIT-COL

THE CITIZENS AND SOUTHERN NATIONAL BANK, Co-Trustee of the estate of Emanuel Ullman deceased,

Petitioner

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

McKIBBEN LANE,
CHAS. J. BLOCH,
WILLIAM C. TURPIN, JR.,
Counsel for Petitioners.

HALL & BLOCH,
TURPIN & LANE,
Of Counsel.

LYON, HARRIS & BROOKS, MACON, GA.

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI 1

A. Summary statement of the matter involved 1

B. Reasons relied on for the issuance of the writ 2

C. Prayer for writ 7

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI 9

I. Opinions of the Courts below 9

II. Jurisdiction 9

III. Statement of the case 9

IV. Specification of Errors 12

V. Argument 13

Point 1: Was the transaction a distribution in partial liquidation or was it in fact a sale? 13

Point 2: Reasons for granting the writ 15

A. An important Federal question not heretofore decided by hte Court involved 15

B. The decision below conflicts with applicable decisions of this Court 16

C. The decision below conflicts with decisions of other Circuit Courts of Appeal 17

CONCLUSION 18

TABLE OF CASES CITED

Ahles Realty Corp. v. Com. 71 Fed. (2d) 150 18

Bassick v. Commissioner, 85 Fed. (2d) 8, 9 18

Clark v. Citizens & Southern Natl. Bank: 172 Ga. 625; 158 S.E. 297 6

Clark v. Clark, 167 Ga. 1; 144 S.E. 787 6

139658

Dodd v. Commissioner, 131 Fed. (2d) 382 15
Eisner v. Macomber, 252 U.S. 289 13-16
Helvering v. Bashford, 302 U.S. 454 14-16
Helvering v. General Utilities, etc., 74 Fed. (2d) 972 18
Helvering v. Security Savings Bank, 72 Fed. (2d) 874 17
Minnesota Tea Co. v. Helvering, 302 U.S. 609 16
Pearson v. McGraw, 308 U.S. 313 14-16
Prairie Oil and Gas Co. v. Motter, 66 Fed. (2d) 309 17
Tulsa Tribune v. Com., 58 Fed. (2d) 937, 940 17
U. S. v. Phellis, 257 U.S. 156 13
Woodruff v. Com., 131 Fed. (2d) 429 15

STATUTES CITED

Revenue Act of 1936, Sec. 117 (a) 2
Revenue Act of 1936, Sec. 115 2-3
Sec. 240 Judicial Code 9

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1943

No.....

THE CITIZENS AND SOUTHERN NATIONAL BANK, Co-Trustee of the estate of Emanuel Ulman, deceased,

Petitioner

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

May it please the Court:

The petitioner, The Citizens and Southern National Bank, as co-trustee of the estate of Emanuel Ulman, deceased, by its attorneys, McKibben Lane, William C. Turpin, Jr., and Charles J. Bloch, respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The controlling question in this case is:

A testamentary trustee, upon the death of the

testate, receives as such trustee common stocks which are not legal investments for trustees under the laws of the State. Under the law of the State, it can only hold these stocks at its own risk. The trustee is not able to find a purchaser for such common stocks by reason of the excessive price thereof. May the trustee exchange the stock with the corporation which issued it for stock in another corporation for which there is a market (such exchange being for the sole purpose of immediately selling such latter stock) without liability for taxation as for a dividend in liquidation of the corporation with which it made the exchange.

Does not the substance of a transaction rather than the form determine income tax liability?

B

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The pertinent portion of Section 117 (a) of the Revenue Act of 1936 is:

> "SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) General Rule—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> * * * * * * *
>
> 40 per centum if the capital asset as been held for more than 5 years but not more than 10 years;"

The pertinent portion of Section 115 of the Revenue Act of 1936 is:

"SEC. 115. DISTRIBUTION BY CORPORATIONS.

* * * * * * *

(c) Distributions in Liquidation. — Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117(a), 100 per centum of the gain so recognized shall be taken into account in computing net income. * * *

* * * * * * *

"(i) Definition of Partial Liquidation. — As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

The Citizens and Southern National Bank was under the Will of the Decedent, Emanuel Ulman (date of death: July 11, 1929), appointed co-executor and co-trustee. The Will required the payment of debts and certain specific bequests, and the residuary net estate was to be held in trust for the benefit of specific beneficiaries, the income to be paid to certain life tenants, and upon the death of the life tenants, the Corpus of the Estate was to be distributed to a Residuary Legatee or Remainderman.

Included in the inventory of assets of the Decedent, at date of death, was 100 shares of Coca-Cola International Corporation common stock, which stock was valued at $29,375.00 for Federal Estate tax purposes.

In August and September 1936, the "Trust Committee" of The Citizens and Southern National Bank, in accordance with the duties placed upon them by law, reviewed the assets of the Estate of Emanuel Ulman, and their findings resulted in a recommendation that all investments then held by the Estate be sold as early as possible.

The "Trust Committee" authorized and instructed the Trust Officer in Charge to sell all of the investments owned by the Estate of Emanuel Ulman.

The Trust Officer, acting under the instructions of the Trust Committee, delivered the 100 shares of Coca-Cola International Corporation common stock to Fenner & Beane, Stockbrokers, Macon, Georgia, with specific instructions that the stock was to be sold.

Fenner & Beane had full knowledge that the stock was placed with them to be sold on the New York Stock Exchange.

Fenner & Beane converted the 100 shares of Coca-Cola International Corporation common stock, into 800 shares of Coca-Cola Company common stock, *receiving eight certificates for* 100 *shares each, registered in the name of Fenner & Beane.*

The canceled Coca-Cola International Corporation common stock certificates bear the following rubber stamp notation "We hereby certify that we have no ownership, or interest, in shares of the stock above trans-

ferred. *The transfer by the owner to us being merely for the purpose of sale.* Fenner & Beane, 67 Broad St., N.Y.C."

Fenner & Beane did not deliver the converted stock (Coca-Cola Company) to the Trustee, but sold the 800 shares of Coca-Cola Company common stock, and remitted the proceeds to the Trustee.

Fenner & Beane made the conversion of 100 shares of Coca-Cola International common stock into 800 shares of Coca-Cola Company common stock with the consent of the Trust Officer of petitioner. There had been no sales of International on the New York Stock Exchange since November, 1934, whereas Coca-Cola Company common stock was being bought and sold almost daily. At that time there existed an inrevocable resolution of the Board of Directors of International, whereby the stockholders of International might at any time exchange their shares in International plus a small exchange fee, for eight times the number of shares of Coca-Cola.

Petitioner was advised by Fenner & Beane that it would facilitate matters if petitioner's 100 shares of International common was first exchanged with International for 800 shares of Coca-Cola common. Following this advice, petitioner's Trust Officer told Fenner & Beane to handle it in that manner.

The Board of Tax Appeals held that when Fenner & Beane exchanged with International for petitioner's account, the 100 shares of International Common, which were then retired, and received from International the 800 shares of Coca-Cola common, the receipt of such shares for petitioner's account represented "amounts distributed in partial liquidation" as that term is used in

Section 115(c) and defined in Section 115(i) of the Revenue Act of 1936, *supra*, and that despite the provisions of Section 117 (a), *supra*, of the same Revenue Act, 100 per centum of the gain so recognized should be taken into account in computing net income. The decision resulted in an additional tax of $10,850.80.

The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the Board of Tax Appeals, Circuit Judge Waller dissenting.

In the dissenting opinion, your petitioner's contentions are well summarized:

> "The exchange of stock was not made by the Trustee with any idea of aiding the Coca-Cola International Corporation to liquidate, but was done solely for the purpose of enabling the Trustee to comply with the requirements of the Georgia law. In substance, the Trustee, desiring to sell International stock, and finding that it could not, swapped it for something it could sell, and thereby disposed of a capital asset. The fact that Coca-Cola International was liquidating was purely incidental. *The transaction, in fact, purpose and substance, was a sale of a capital asset and not an exchange in aid of, or in contemplation of liquidation.* The entire purpose of the transaction was to permit the Trustee to dispose of a capital asset which it was illegal for it to hold under the Georgia law (*Clark v. Clark*, 167 *Ga.* 1; 144 *S.E.* 787; *Clark v. Citizens and Southern National Bank*, 172 *Ga.*, 625; 158 *S.E.* 297). I am unwilling to substitute form for substance when to do so penalizes one who is merely undertaking in good faith to comply with the State law. The Coca-Cola common stock was bought by the agent in the

name of the agent, and sold by the agent, all as a means of selling Coca-Cola International stock. It was illegal, under the Georgia law, for the Trustee to buy the Coca-Cola common stock to the same extent as it was illegal for it to hold the International stock. The purchase by the Trustee of the Coca-Cola stock appears to be void as against the public policy of the State of Georgia. Certainly the Trustee was not undertaking to buy Coca-Cola common stock. It was undertaking to sell Coca-Cola International stock. I consider the acquisition of the Coca-Cola common stock an incident only to the sale of the Coca-Cola International stock — the means to an end."

(Emphasis and citation ours).

We think that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Certainly, if that statement is not correct, the Circuit Court of Appeals has decided an important question of Federal law which has not been but should be, settled by this Court. Further the Circuit Court of Appeals in this case has placed its decision on a principle which conflicts with decisions of the other Cricuit Courts of Appeals.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, directing that Court to certify and send to this Court, for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its

docket "No. 10616, The Citizens and Southern National Bank, Co-Trustee of the Estate of Emanuel Ullman, deceased, v. Commissioner of Internal Revenue", and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.
July 19, 1943.

McKIBBEN LANE,

CHAS. J. BLOCH,

WILLIAM C. TURPIN, JR.,
Counsel for Petitioner.

HALL & BLOCH,
TURPIN & LANE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1942 was rendered on June 15th, 1943. The opinion together with the dissenting opinion of one of the Judges is to be found on page 45 of the record herein.

The opinion of the United States Board of Tax Appeals B.T.A. Docket No. 100771 was rendered on March 10th, 1942. It is to be found on page 14 of the record herein.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Section 240 of the Judicial Code as Amended by the Act of February 13, 1925 (C. 229 sec. 1, 43 Stat. 938).

2. The judgment sought to be reviewed was entered on June 15th, 1943 (R. page 50).

3. The proceeding in which review is sought was initiated in the United States Board of Tax Appeals. It involved the liability of petitioner for income taxes as for a partial distribution in liquidation under Section 115 of the Revenue Act of 1936.

III.

STATEMENT OF THE CASE.

In March 1936, appellant, while acting as trustee

under the will of Emanuel Ulman, held 100 shares of the common stcok of the Coca-Cola International Corporation. Under the law of Georgia the trustee could not properly retain this stock, nor any common stock, and determined to sell it for the purpose of reinvestment in securities which it could properly retain. Formal corporate action was taken directing the sale of the stock. In September 1936 the trustee directed Fenner & Beane, members of the New York Stock Exchange, to sell the International stock.

Coca-Cola International Corporation was a holding company, and each share of International was equivalent in value to eight shares of Coca-Cola common. The sales price of International was consequently eight times that of Coca-Cola and International at the time of the transaction in question had a value of $969.00 per share. Coca-Cola was actively traded in on the market; International was rarely sold, and because of its high price it was difficult, if not impossible, to dispose of the International stock.

Accordingly Fenner and Beane suggested that the sale of the stock (which was petitioner's only objective) would be facilitated if they were permitted to exchange the International for Coca-Cola and forthwith sell the Coca-Cola.

The trustee authorized Fenner and Beane to proceed in accordance with their suggestion. Fenner and Beane exchanged the 100 shares of International with International Company for 800 shares of Coca-Cola common, which shares were issued in the name of Fenner and Beane. The certificates for the Coca-Cola were never delivered to appellant, and have never been in appellant's possession, but were forthwith sold on the

open market by Fenner and Beane and the proceeds remitted to appellant.

The net proceeds of the transaction were $96,926.02. The cost price of the International was $29,375.00, indicating a profit of $67,551.02.

The trustee, consistently with the only position it has ever taken in respect to this transaction, regarded the matter simply as a sale of a capital asset, and assumed that Section 112 (2) and 117 (a) of the Revenue Act of 1936 were applicable. The trustee made returns in accordance with this assumption. If the assumption is correct, the trustee's return is correct, and 40% of the gain or $27,025.41 was properly included in taxable income.

This is, and always has been, the position of the trustee.

The Commissioner took the position that the transaction was a distribution in partial liquidation of Coca-Cola International and that Section 115 (c) of the 1936 Revenue Act applied, so that 100% of the profit on the transaction should have been included in the return.

The result of the Commissioners' action was a finding of a deficiency in the trustee's return, resulting in a tax liability of $10,850.80.

The trustee filed its petition with the Board of Tax Appeals seeking to sustain its position; the Board of Tax Appeals on March 14th, 1942, decided against petitioner's contention. Petitioner thereupon filed its appeal in the Circuit Court of Appeals for the Fifth Circuit, which Court in a divided opinion affirmed the decision of the Board of Tax Appeals.

The petitioner now seeks a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit.

IV.

SPECIFICATION OF ERRORS.

The taxpayer relies upon and urges each of the following specifications of error:

1. The Board erred in holding that the amount of gain on the sale or exchange of the 100 shares of Coca-Cola International Corporation stock to be included in computing 1936 income tax liability of the estate was $67,551.02.

2. The Board erred in holding that the 800 shares of the Coca-Cola Company stock received by the brokers represented a distribution "in partial liquidation" of Coca-Cola International Corporation within the meaning of Section 115 (i) of the Revenue Act of 1936.

3. The Board erred in failing to hold that the exchange of 100 shares of Coca-Cola International Corporation stock for 800 shares of the Coca-Cola Company stock was merely an initial step in a single transaction sought to be accomplished by the sale of the Coca-Cola International Corporation stock.

4. The Board erred in failing to hold that in respect to the proceeds of the sale of said shares the estate was entitled to the benefit of the provisions of Section 117 (a) of the Revenue Act of 1936.

5. The Board erred in failing to find and to hold that the only purpose of the trustee was to accomplish the sale of the Coca-Cola International Corporation stock.

6. The Board erred in holding and deciding that there is a deficiency in 1936 income tax liability of the estate in the amount of $10,635.79.

V.

ARGUMENT.

WAS THE DISPOSITION OF THE INTERNATIONAL STOCK BY PETITIONER A PARTIAL LIQUIDATION OF THE COCA-COLA INTERNATIONAL CORPORATION OR WAS IT IN FACT A SALE OF THE STOCK IN INTERNATIONAL CORPORATION HELD BY PETITIONER?

The confusion which has arisen in seeking an answer to this question comes about because of the existence of two apparently inconsistent rules of law.

The first proposition is that regard must be had for substance rather than for form.

> *Eisner vs. Macomber,* 252 *U.S.* 189; 40 *Supreme Court* 189; 64 *L. Ed.* 521; 9 *A. L. R.* 1570.

The second is that what was done rather than the design and purpose of the participants should be the test.

> *U. S. vs. Phellis,* 257 *U.S.* 156, 172; 42 *Supreme Court* 63; 66 *L. Ed.* 180.

The inconsistency is more apparent than real and results from an effort to apply one principle to the exclusion of the other, even when to do so makes it necessary to break up one indivisible transaction into several parts and then to take one of these parts — in itself meaningless — and to reach a conclusion based

solely on the one fragmentary step in the unitary transaction. Obviously such a procedure can not be expected to produce a correct conclusion.

It has never been questioned that the sole intention, purpose and design of petitioner was to sell its Coca-Cola International stock in order to comply with the State Law. Petitioner consented that its agent exchange International for Coca-Cola common, and its agent immediately sold the Coca-Cola common. The common was never even registered in the name of petitioner. It is to be remembered that none of this was done until every effort to sell the International on the market proved that it was impossible to secure a purchaser for it, and that the only method left open to petitioner was the course which it took.

It inescapably follows that in substance what happened was that petitioner sold the International stock. Such a conclusion necessarily resulted from an economic standpoint since all that ever actually happened was that petitioner parted with the International stock and received the value thereof in exchange. Equally the same result is reached from a legal standpoint unless the purpose of the transaction be disregarded and one step isolated and held to be controlling without regard to the indivisible nature of the whole transaction. Such logic has never received the approval of this Court.

Helvering vs. Bashford; 302 *U.S.* 454; 82 *L. Ed.* 367.

Pearson vs. McGraw; 308 *U.S.* 313; 84 *L. Ed.* 293.

REASONS FOR GRANTING THE WRIT.

I.

PETITIONER RESPECTFULLY URGES THAT THE APPLICATION OF SECTION 115 (C) OF THE INTERNAL REVENUE CODE TO A SITUATION SUCH AS EXISTS IN THE CASE AT BAR IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

The direct question involved has only arisen three times and all three cases involve similar transactions with respect to the same corporation, and all three were decided by the Circuit Court of Appeals for the Fifth Circuit.

The first two cases were Dodd vs. Commissioner, 131 Fed. (2d) 382 and Woodruff vs. Commissioner, 131 Fed. (2d) 429.

Both these decisions were unanimous and both were adverse to petitioner.

The third case is the case at bar in which one of the three Circuit Judges rendered a vigorous dissent to the rule laid down by the majority.

The majority opinion was based solely and squarely on the two decisions just referred to.

This Court has never passed directly on the issue involved.

It seems fair to say that this record presents an important Federal question which only this Court can finally determine.

II.

PETITIONER RESPECTFULLY URGES THAT IN THIS CASE THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is respectfully argued that the decision in this case is in conflict with Eisner vs. Macomber.

"In order therefore that the clauses cited from Article 1 of the Constitution may have proper force and effect, save only as modified by the amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income' as the term is there used and to apply the distinction as cases arise according to truth and substance without regard to form."

> *Eisner vs. Macomber,* 252 *U.S.* 189; 40 *Supreme Court* 189; 64 *L. Ed.* 521; 9 *A. L. R.* 1570.

The decision of the Court below is in direct conflict with the principle laid down in the following cases:

> *Helvering vs. Bashford,* 302 *U. S.* 454; 82 *L. Ed.* 367.
>
> *Pearson vs. McGraw,* 308 *U.S.* 313; 84 *L. Ed.* 293.
>
> *Minnesota Tea Company vs. Helvering,* 302 *U.S.* 609; 82 *L. Ed.* 474; 58 *Supreme Court* 393.

The given result at the end of the path is the determinative factor in the eminently practical business of taxation.

With all respect it is maintained that the decision under consideration is in conflict with these decisions of this Court.

III.

PETITIONER FURTHER RESPECTFULLY URGES THAT THE DECISION IN THIS CASE IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE 2ND, 4TH AND 10TH CIRCUITS.

Petitioner does not maintain that the decision in the case at bar conflicts with decisions of the other Circuits on the identical subject matter involved; we do maintain that this decision is diametrically opposed to the substance of the decisions hereinafter discussed.

The substance of the decision in this case is that where two transactions are involved no matter how closely related they may be, and no matter how correct the purpose underlying the transaction may have been, if one can be separated from the other and a more severe tax imposed as a result, the integral transaction must be separated, the purpose and intention of the taxpayer disregarded and the isolated portion of the transaction alone recognized.

The Circuit Courts of Appeals for the Second, Fourth and Tenth Circuits have held consistently that a single transaction can not be treated as two separate transactions in all cases in which the taxpayer could secure a benefit by dividing the unified transaction into its constituent parts.

Prairie Oil & Gas Co. v. Motter, 66 F. (2d) 309; Tulsa Tribune v. Commissioner, 58 F. (2d) 937, 940; Helvering v. Security Savings & Commercial Bank, 72 F. (2) 874; Helvering v. General Utilities & Operating

Co., 74 F. (2d) 972; Ahles Realty Corporation v. Commissioner, 71 F. (2d) 150; Edgar W. Bassick v. Commissioner, 85 F. (2d) 8, 9.

It follows that if in the acquisition of property the transaction will be viewed as a whole and the steps not be separated, the same rule applies to the disposition of property and the steps not be separated. Such would be the conclusion in other Circuits; in the Fifth Circuit if the case at bar is followed, the result would necessarily be exactly the opposite.

CONCLUSION.

Petitioner has not undertaken in this brief to argue the main case in any detail. We have undertaken to show that the decision which we are seeking to review is erroneous. No one has ever questioned the absolute good faith of the taxpayer in this transaction and a statement of the conclusions reached by the Court below is perhaps as comprehensive an argument for a reversal of that decision as could be made in a more elaborate and extended brief.

It is respectfully submitted that this case calls for the exercise by this Honorable Court of its supervisory powers in order; first, that the construction and application of the Federal Tax Law involved be definitely settled; and second, that the errors of the United States Circuit Court of Appeals of the Fifth Circuit be corrected, and that to such end a writ of certiorari should

be granted and the Court should review the determination of said Circuit Court of Appeals and reverse it.

July 19th, 1943.

McKIBBEN LANE,
CHAS. J. BLOCH,
WILLIAM C. TURPIN, JR.,
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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	8

CITATIONS

Cases:

Dodd v. *Commissioner*, 131 F. 2d 382 — 7

Woodruff v. *Commissioner*, 131 F. 2d 429 — 7

Statute:

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 115 — 2, 7

Sec. 117 — 3, 7

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 205

THE CITIZENS & SOUTHERN NATIONAL BANK, CO-TRUSTEE OF THE ESTATE OF ENAMEL ULMAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–29) is reported at 46 B. T. A. 517. The opinion of the Circuit Court of Appeals (R. 44–47) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 15, 1943 (R. 47–48). Petition

for a writ of certiorari was filed July 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer held stock of a holding company which it had the right to exchange for stock of the subsidiary. In order to facilitate disposition of its shares for cash, the taxpayer exchanged the stock and then sold the subsidiary's shares. The question is whether the exchange is taxable as a partial liquidation under Section 115 (c) and (i) of the Revenue Act of 1936.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stocks, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117 (a), 100 per centum of the gain so

recognized shall be taken into account in computing net income, * * *

* * * * *

(i) *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

* * * * *

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

* * * * *

STATEMENT

The taxpayer is trustee of the estate of Emanuel Ulman (R. 17).[1] At the time of decedent's death in 1929 his assets included 100 shares of the common stock of the Coca-Cola International

[1] Originally, there were two individual trustees in addition to the taxpayer corporate trustee. The former were discharged in April 1938. For convenience we shall refer to the taxpayer as the only trustee.

Corporation (hereafter referred to as International). International was a holding company organized in 1922 by holders of a majority of the common stock of The Coca-Cola Company (hereafter referred to as Coca-Cola). In 1926 International passed an irrevocable resolution providing that its stockholders might at any time surrender the capital stock of International to it and receive in exchange shares of Coca-Cola stock of an equivalent value, and that the International stock so surrendered should be retired and cancelled. Originally, one share of International stock was equivalent to one share of Coca-Cola stock, but successive stock dividends by Coca-Cola while the stock of International remained constant caused one share of International to be the equivalent of eight shares of Coca-Cola. (R. 18, 22, 24.)

The decedent's 100 shares of International had an agreed value of $29,375 at the date of his death. No stocks held by Ulman at his death were considered legal investments by trustees under the Georgia laws. In 1936, the trustee decided to sell all of the stock and bonds held in the estate, with a view to reinvestment in legal investments under Georgia laws. E. C. Scott, its trust officer, was directed to proceed with the sale. The trustee considered that it might be held personally liable if it continued to hold the assets of the estate in nonlegal investments and a loss

should result, and the consent of all the beneficiaries to its continuing to hold these investments could not be obtained. (R. 18–19.)

On or about September 5, 1936, Scott placed an order with the Macon branch of the brokerage firm of Fenner & Beane to sell the 100 shares of International common stock. The branch manager of that firm, J. T. Hogan, transmitted by wire the order to sell to their New York office. The New York office wired Hogan suggesting that the sale would be facilitated if the International common were first exchanged for 800 shares of Coca-Cola common. Hogan conveyed this suggestion to Scott, pointing out that it would be difficult to find buyers for International common, as each share had a value of over $900, whereas there was an active market for Coca-Cola common. No sales of International have been made on the New York Stock Exchange since November, 1934. (R. 19, 21.)

Scott then instructed Hogan to exchange 100 shares of International common for 800 shares of Coca-Cola common and to sell the 800 shares of Coca-Cola common at a fixed price. In accordance with these instructions the certificate for the 100 shares of International common was delivered to Fenner & Beane on September 8, 1936 (R. 20).

Thereafter, Fenner & Beane exchanged with International the certificate for 100 shares of International for eight certificates of 100 shares each of Coca-Cola common, and charged taxpayer with

the transfer tax and exchange fee, amounting to $65. The 100 shares of International stock were permanently retired. The new certificates were issued in the name of Fenner & Beane and were never actually delivered to taxpayer. However, Fenner & Beane never buy or sell stocks for their own account. (R. 20, 24.) Typed on the back of the certificate for 100 shares of International was a certification as follows (R. 20):

> We hereby certify that we have no ownership, or interest ---------- in ---------- shares of the stock above transferred. The transfer by the owner to us being merely for the purpose of sale.
>
> FENNER & BEANE,
> 67 Broad St., N. Y. C.

On September 29, 1936, Fenner & Beane made three sales for taxpayer's account of 100 shares each of the Coca-Cola common at 121½, and on October 5, 1936, they made two sales of 200 each and one sale of 100 shares, all at 121½. The net proceeds of the sales, amounting to $96,926.02 were duly remitted to taxpayer. None of the sales was made to Coca-Cola. (R. 20.)

The Commissioner determined that the exchange of the International shares for Coca-Cola common constituted a partial liquidation of International resulting in a gain to the taxpayer which was taxable in full under Section 115 (c) and (i) of the Revenue Act of 1936 (R. 16). The Board of Tax

Appeals sustained the Commissioner (R. 28–29), and the court below affirmed (R. 47–48).

ARGUMENT

It is not denied that the taxpayer's exchange of International stock for Coca-Cola shares, standing alone, constitutes a partial liquidation within the definition of Section 115 (i) of the Revenue Act of 1936, *supra,* and that consequently the gain realized upon this transaction would be fully taxable under Section 115 (c). The issue is whether the exchange should be disregarded for tax purposes and the transaction considered solely as a direct sale of the International shares subject to the capital gain limitations of Section 117 (a).

The decision of the court below is in accord with its two prior decisions concerned with the tax consequences of similar transactions by holders of International stock (*Dodd* v. *Commissioner,* 131 F. 2d 382; *Woodruff* v. *Commissioner,* 131 F. 2d 429), and no other cases have been decided which involve this issue. The taxpayer here had its choice of two ways by which it could dispose of its International stock for cash. One was to sell the International stock itself. The other was to exchange this stock for shares of Coca-Cola and sell the Coca-Cola. It chose the latter for the practical, business reason that the Coca-Cola shares were more marketable. The exchange, therefore, plainly had substance as a separate transaction,

and in the circumstances it could not properly be disregarded for tax purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943